ANTHONY TING CHIO PANG

v.

WONG BING SENG

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CIVIL APPEAL NO: 20-12-2-1996]
19 MARCH 1997

TORT: *Negligence - Standard of care - Solicitors - Duty to client - Purchase of land - Failure to ascertain identity of purported land owner - Failure to conduct adequate land search - Failure to retain client's purchase price until registration of memorandum of transfer - Whether proximate causes of client's loss - Intervening act - Whether chain of causation broken*

LEGAL PROFESSION: *Duty of care - Conveyancing - Duty to client - Standard of care required - Whether acted as a reasonably competent solicitor*

LAND LAW: *Sale of land - Duty of solicitor to client - Whether must ascertain identity of person claiming to be land owner - Whether must conduct adequate land search - Whether must retain client's purchase price until registration of memorandum of transfer*

This was an appeal by the 1st defendant ('the appellant') against the decision of the Sessions Court in allowing the claim of the plaintiff ('the respondent'). The respondent had earlier brought an action against the appellant, a legal assistant in the employ of the 2nd defendant who was practising under the legal firm *Tang & Co*, for negligence and/or breach of contractual duty and negligent misrepresentation in handling the respondent's purchase of a piece of land.

The respondent submitted that the appellant was negligent on three grounds, *viz:* (i) the appellant had failed to practise the standard of care of a reasonably competent solicitor in ascertaining the identity of the person who claimed to be the owner of the land; (ii) the land search conducted by the appellant was improper or inadequate; and (iii) the appellant was acting below the standard of a reasonably competent and careful solicitor in releasing the respondent's cheques to the alleged owner of the land before the registration of the memorandum of transfer. The respondent further submitted that had the appellant exercised reasonable care in respect of grounds (i) & (ii), then no transaction would have taken place and, consequently, the appellant's contention that it was the 2nd defendant who authorised the release of the cheques would become irrelevant.

The appellant submitted that it was the 2nd defendant's act of authorising the release of the cheques which was the actual cause of the respondent's loss. Thus, the appellant argued that even if he was negligent in respect of grounds (i) & (ii), it was not the operative cause of the respondent's loss as the intervening act of the 2nd defendant in releasing the cheques had broken the chain of causation.

Held:

[1] The Sessions Court was right in holding that the appellant was negligent in failing to ascertain the identity of the person who claimed to be the owner of the land. Had he done so, the transaction might not have taken place and the respondent might not have suffered the loss.

[2] The Sessions Court was also right in holding both the appellant and the 2nd defendant negligent for failing to conduct a proper and an adequate land search.

[3] The Sessions Court had rightly concluded that the cheques were handed by the respondent to the appellant; thus, it was justified in coming to the inference that it was the appellant's or the 2nd defendant's firm's decision to release the cheques.

[4] The negligence of the appellant, in failing to ascertain the identity of the person who claimed to be the owner of the land and in failing to conduct a proper and an adequate land search, was the proximate cause of the loss suffered by the respondent. Hence, the argument as to whether it was the appellant or the 2nd defendant who authorised the release of the cheques was irrelevant.

[Appeal dismissed.]

For the appellant - John Tiong; M/s. Tiong, Lim, Wong & Co., Advoc., Sibu
For the respondent - Mark Foong; M/s. Mark Foong, Advoc., Kuching

JUDGMENT

Tee Ah Sing J:

This is an appeal by the appellant/1st defendant against the decision of the learned Sessions Court Judge in allowing the claim by the respondent/plaintiff for the sum of RM50,100 with interest thereon at 8% per annum from the date of filing of the writ to the date of realisation and costs.

The respondent/plaintiff brought an action against the appellant/1st defendant, a legal assistant in the employment of the 2nd defendant who was practising under the legal firm of Tang & Co. for negligence and/or breach of contractual

duty and negligent misrepresentation in the course of the handling of the purchase of a piece of land Lot No. 3264 Seduan Land District by the respondent/plaintiff for RM50,000.

The learned Counsel for the appellant/1st defendant proceeded only with grounds 8(b) and 11 in the Memorandum of Appeal and withdrew the other grounds of appeal.

He submitted that the learned Sessions Court Judge accepted the respondent's version and he held on the balance of probabilities that the cheques Exhs. P3 and P4 were handled by the staff of "Tang & Co." and therefore was handed by the respondent to the appellant instead of directly to Abu Bakar (see p. 350 of the Record of Appeal). The learned Sessions Court Judge held that by necessary inference it was either the appellant's or 2nd defendant's decision that the cheques were later released to Abu Bakar and accordingly they were both liable to the respondent (see p. 352 of the Record of Appeal).

It is clear that the learned Sessions Court Judge did not go further to find whether it was the appellant who directed the cheques to be released to Abu Bakar. The proximate cause of the loss or damage to the respondent was the release of the cheques. It was thus submitted that if the appellant did not authorise the release of the cheques then he should not be liable for the loss to the respondent.

There is no direct evidence that the appellant authorised the release of the cheques. Indeed no question was put to him in cross-examination that he released or authorised the release of the cheques.

It was submitted that it is very probable that the cheques were released on the instructions of the 2nd defendant and not the appellant.

If the learned Sessions Court Judge had considered the evidence in their totality he would have inferred that it was the intervening act of the 2nd defendant in releasing the cheques which caused the loss.

In conclusion it was submitted that the learned Sessions Court Judge having found that the cheques were released before the transfer was accepted for registration should have gone further and addressed his mind to the question of whether the appellant knew or consented to or authorised the endorsement and uncrossing of the cheque of RM40,000. The learned Sessions Court Judge had misdirected himself when he asked the question "Was the 1st defendant negligent in paying out the purchase price i.e. cheques Exhs. P3 and P4 before the plaintiff was registered as proprietor?" The question already assumed that it was the appellant who paid out the purchase price. The learned Counsel for the appellant submitted that the learned Sessions Court Judge should have

asked himself "was there negligence in paying out the purchase price i.e. cheques Exhs. P3 and P4 before the plaintiff was registered as proprietor, and if so, was it the 1st defendant or the 2nd defendant who directed the payment?" If the learned Sessions Court Judge had asked himself this question, and considered the evidence of the respondent he would no doubt have concluded that the appellant was not responsible for the loss.

The learned Counsel for the respondent submitted that the appellant was negligent because of three grounds. Each of these grounds is itself sufficient to make the appellant liable in negligence.

The first ground is that the appellant was negligent in relying on the report Kehilangan Kad Pengenalan (P8). There are two reminders printed on the report Kehilangan Kad Pengenalan (P8). And the second reminder clearly stated that the identification card number has not been verified and cannot be accepted as correct.

The appellant had failed to use reasonable care and skill to ascertain the identity of the person who produced the report and put himself forward as the owner of the said land. He contended that if the appellant had been careful and had practised the standard of care of a reasonably competent solicitor all these unfortunate events would be avoided.

There will be no production of cheques to the appellant because there will be no transaction.

The second ground is that there was inadequate search done by the appellant. If the appellant had done a proper search on 21 December 1982, it would have been most likely that there would have been no contractual relationship between the appellant and the respondent.

The third ground is that the appellant was acting below the standard of a reasonably competent and careful practitioner by passing the two cheques Exhs. P3 and P4 to Abu Bakar before the registration of the transfer.

He also submitted that the appellant's position seems to be that tacitly he agreed that the cheques were passed to the appellant but what happened to the cheques later on the appellant claimed no knowledge and no responsibility. He contended that the appellant was liable because he was the lawyer in charge of the transaction and in charge of the two cheques, RM40,000 and RM10,000 which were handed to him by the respondent with a specific instruction that he should not release the cheques until the memorandum of transfer has been registered.

He also contended that had the appellant exercised reasonable care in the matter of the report of the loss of identity card or in the search in the Land

Office he will discover that there is something wrong or at least in the identity card matter he would have asked the parties not to proceed until clarification.

The logical consequence is that had he exercised proper care there will be no transaction and no loss would have incurred to the respondent.

He also submitted that had the appellant exercised reasonable care in grounds one and two the transaction will not happen. Therefore the argument about who authorised the release of the two cheques whether it is the appellant or the 2nd defendant is irrelevant.

In reply the learned Counsel for the appellant submitted that if it was the act of the 2nd defendants which was the actual cause of the loss then whatever the appellant had done previously would not render him liable for anything. The appellant is contending that his acts of negligence as found by the learned Sessions Court Judge in respect of the land search and in ascertaining the true identity of the seller were not the operative cause of the loss.

It is the appellant's contention that the 2nd defendant was the one who directed the release of the cheques to Abu Bakar as the 2nd defendant had endorsed on the cheques. The intervening act of the 2nd defendant in releasing the cheques had broken the chain of causation.

I shall now deal with the judgment of the learned Sessions Court Judge.

The learned Sessions Court Judge had in his ground of decision (at p. 342 of the Appeal Record) said "I hold therefore the 1st defendant was negligent in failing to ascertain that the purported seller was the real Shekh Mohd. Had he so ascertained, the deal might not have proceeded and the plaintiff would not then have suffered damages." I am of the view that the learned Sessions Court Judge has made a correct finding of fact and came to the correct conclusion.

At p. 346 of the Appeal Record the learned Sessions Court Judge also made the correct finding of fact when he said "I do not find that the search conducted by the 1st defendant through Annie Ang, the chief clerk of the 2nd defendant to have been adequate ... I hold both the 1st and 2nd defendants liable in negligence in failing to make a proper search."

In p. 351 of the Appeal Record the learned Sessions Court Judge said:

> On all the evidence it is my finding that the cheques were handed by the plaintiff to the 1st defendant. By necessary inference it was the 1st defendant's or 2nd defendant's firm's decision that the cheques were later released to Abu Bakar on the same day.

The learned Sessions Court Judge believed the testimony of the respondent that he handed the two cheques (P3 and P4) to the appellant but disbelieved the testimony of the appellant that he did not receive the two cheques. In this respect I am of the view that the learned Sessions Court Judge who has the opportunity to observe the demeanour of the witnesses came to the correct decision.

Since the learned Sessions Court Judge had rightly concluded that the two cheques were handed by the respondent to the appellant, he was justified to come to the necessary inference that it was the appellant's or 2nd defendant's firm's decision that the cheques were later released to Abu Bakar on the same day.

PW1 (the respondent) (at p. 41 of the Appeal Record) in his examination-in-chief stated: "At first I made out 3 cheques all payable to Tang & Co. and crossed and handed them over to Anthony Ting ... Anthony Ting received all the 3 cheques from me and I saw him place the rubber stamp of "Tang & Co." at the back of the cheques and I told Mr. Ting to hold my money until the transfer was registered in my name."

It is clear from the evidence adduced that the appellant was the solicitor in charge of the conveyancing. The respondent has given specific instruction to the appellant not to release the money until the transfer was registered in the respondent's name. And we have the correct finding of fact by the learned Sessions Court Judge that the two cheques, one for RM40,000 and the other one for RM10,000 were handed to the appellant and received by the appellant. Therefore it was the responsibility of the appellant to see that the cheques were not paid out. However, the cheques were paid out before the transfer was registered in the respondent's name.

I am of the view that since the appellant was the solicitor entrusted with the two cheques and to do the conveyancing he is liable for the loss suffered by the respondent.

Further, I am of the view that the negligence of the appellant in not conducting an adequate and proper search at the Land Registry and his negligence in not ascertaining the identity of the person who produced the report of the loss of identity card (P8) were the proximate causes for the respondent to suffer the loss. For had the appellant not been negligent in respect of these two grounds there would be no transaction entered and no payment by the respondent. On either of these grounds the appellant is liable for the loss suffered by the respondent. Therefore the argument about who authorised the release of the two cheques whether it is the appellant or the 2nd defendant is irrelevant.

In view of the foregoing I dismiss the appeal with costs to be taxed unless agreed.

Reported by Alex KC Lee